IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL G. MOCK and MARY J. MOCK, Husband and Wife,	)	**No. 24504-7-III**
Respondents,	)	**Division Three**
v.	)	**UNPUBLISHED OPINION**
JAMES E. COOK and BRENDA JEAN COOK, Husband and Wife, d.b.a., COOK CONSTRUCTION & ROOFING, A Sole Proprietorship, and Mid-Century Insurance Co., and John Does I, II, and III,	)	
Appellants.	)	

BROWN, J.—In this roofing contract dispute between James E. Cook, Brenda J. Cook, Cook Construction, and Mid-Century Insurance (collectively Cook) and Michael G. and Mary J. Mock, the arbitrators awarded the Mocks $32,950. The superior court confirmed the award and entered judgment in favor of the Mocks. Contending the award exceeded the arbitrators' powers, Cook appeals. We disagree, and affirm.

FACTS

Cook and the Mocks contracted for Cook to roof the Mocks' home, starting on April 21, 2004 and finishing on April 28, 2004 for $7,400. Because the Mocks were residing in an apartment, they expressed their need for timely construction completion. The Mocks paid Cook $3,700, agreeing to pay the balance upon completion.

Three months later, the project still was not complete. The Mocks sued, alleging multiple breaches of the parties' contract and violation of the Consumer Protection Act (CPA). Per their contract, the parties submitted to arbitration.

The arbitrators found no CPA violation, but decided Cook breached the parties' contract, "because the roof was not constructed in a proper and workmanlike manner, was not built according to industry standards, applicable codes nor accepted engineering principles, and is not suitable in its present condition." Clerk's Papers (CP) at 29. The arbitrators decided the proper measure of damages was the cost to reconstruct and repair the roof, not the value diminution as asserted by Cook.

The arbitrators awarded $18,500 for repair and reconstruction, $3,700 for return of initial payment, and $750 for an extra month of rent. Further, the Mocks received $10,000 general damages for "many adverse consequences of the breach," consisting of, "a lengthy delay in the occupation and enjoyment of their entire dwelling, the time, effort, and anxiety involved in the bidding process and all other matters involved in the tearing down of the roof and its replacement, including financing issues and dealing with public officials involved in the construction of homes." CP at 31. The award

totaled $32,950 for special and general damages.

The Mocks moved to confirm the arbitration award and Cook moved for award vacation. The superior court confirmed the award and entered judgment in favor of the Mocks for $32,950, and later amended the award to include $200 for statutory attorney fees, $110 for costs, and $25 in arbitration costs. Cook appealed.

ANALYSIS[1]

A. Arbitration Award

Cook contends the arbitrators exceeded their award powers, used the wrong measure of damages, awarded excessive damages, unjustly enriched the Mocks, and improperly granted consequential and general damages.

In reviewing an arbitration award under chapter 7.04A RCW, we use the same review standard applied by the superior court. *Expert Drywall, Inc. v. Ellis-Don Constr. Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997). Arbitration is a statutory special proceeding controlled by chapter 7.04A RCW. The trial court's power to vacate an arbitration award is governed by RCW 7.04A.230(1). Cook argues the trial court should have vacated the award pursuant to subsection (d), requiring the court to vacate an award if: "An arbitrator exceeded the arbitrator's powers."

Cook bears the burden of proof. *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990). Washington courts confer

[1] Initially, we rule Cook's September 2, 2005 notice of appeal is timely filed because the amended order from which Cook's appeal was filed on the same date.

substantial finality on decisions of arbitrators rendered in accordance with the parties' contract and chapter 7.04A RCW. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Judicial scrutiny does not include review of an arbitrator's decision on the merits. *Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992). "The grounds for vacation must appear on the face of the award." *Westmark Props., Inc. v. McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). "A statement of reasons for the award is not part of the award." *Id.* at 403 (citing *Lent's Inc. v. Santa Fe Eng'rs, Inc.*, 29 Wn. App. 257, 628 P.2d 488 (1981)). Basically, to vacate an award under subsection (d), the award, on its face, must show the adoption of an erroneous rule or mistake in applying the law. *Lindon*, 57 Wn. App. at 816. In other words, an error of law must appear on the face of the award. *Westmark*, 53 Wn. App. at 403 n.1.

First, Cook contends the arbitrators used the wrong measure of damages, or in the alternative, awarded excessive damages. Contract damages are ordinarily based on the injured party's expectation interest and are intended to give the injured party the benefit of its bargain. *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984) (citing RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981)). In breach of construction contract claims, the injured party may recover the reasonable cost of completing performance or remedying defects in the construction if the cost is not clearly disproportionate to the probable loss in value to the party. *Eastlake,* 102 Wn.2d at 47 (adopting RESTATEMENT (SECOND) OF CONTRACTS § 348 (1981)).

The rule's comments indicate this alternative basis for damages applies when it is difficult to determine the value of performance to the injured party with sufficient certainty. In some instances when the performance is defective:

> [I]t may not be possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects. Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be undercompensated by being limited to the resulting diminution in the market price of his property.

Eastlake, 102 Wn.2d at 47-48 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 348 cmt. c (1981)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. b (1981). In *Burr v. Clark*, 30 Wn.2d 149, 190 P.2d 769 (1948), the court set out how to award property damages. Where an injury to property is only temporary and "the property can be restored to its original condition at a reasonable expense," the damages award is the costs of restoration. *Burr*, 30 Wn.2d at 158.

Based on *Eastlake* and *Burr*, using the cost to repair and replace the roof was not an error in law, requiring vacation of the award. And, we reject Cook's claim of excessiveness because Cook fails to show the arbitrators adopted any erroneous rule or made any legal error on the face of the award. *Lindon*, 57 Wn. App. at 816. Alleging an award is excessive is not enough to justify vacating an award. *See E. Nottingham Twp. v. Fisher*, 482 A.2d 291, 293 (Pa. 1984) ("[m]erely characterizing an arbitration

award as excessive is insufficient to justify setting aside the award.").

Further, to review the award amount, we would need to review the arbitrators' record. However, courts ordinarily do not consider evidence presented to the arbitrator. *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 487, 972 P.2d 577 (1999).

> [I]nasmuch as there is no provision in the [arbitration] statute requiring arbitrators to file or preserve the evidence received upon the hearing, it would seem to follow that the errors which will sustain an exception to an award on the ground indicated must be discovered by an examination of the award alone. If it was the intention of the legislature to require the court, upon hearing exceptions taken to awards, to examine the evidence submitted to the arbitrators, or, in other words, to try the cause *de novo*, it is but reasonable to presume that they would have so declared.

Lent's, Inc. v. Santa Fe Eng'rs, Inc., 29 Wn. App. 257, 628 P.2d 488 (1981) (quoting *Moen v. State*, 13 Wn. App. 142, 145, 533 P.2d 862 (1975)). Thus, Cook has failed to prove the amount of the arbitration award was an error of law on the face of the award.

Second, Cook contends the arbitrators unjustly enriched the Mocks by ruling they were entitled to the return of their $3,700 down payment. An unjust enrichment claim must show the defendant was unjustly enriched and that the plaintiff was not a mere volunteer in the transaction. *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 165, 776 P.2d 681 (1989). That one person's actions benefit another is not sufficient to require the other to make restitution. *Id.* Unjust enrichment occurs "where money or property has been placed in a party's possession such that in equity and good

conscience the party should not retain it." *Id.* at 166.

Here, Cook breached the parties' agreement "because the roof was not constructed in a proper and workmanlike manner, was not built according to industry standards, applicable codes nor accepted engineering principles, and is not suitable in its present condition." CP at 29. Given this ruling, the arbitrators could decide Cook should not retain any portion of the contract price without unjustly enriching the Mocks.

Third, Cook contends the arbitrators wrongly awarded consequential and general damages. They allege the $750 for the extra month of rent was contrary to law and the $10,000 for general damages was punitive in nature.

A party may recover consequential damages "which flow from the breach and which could reasonably have been anticipated by the parties." *Family Med. Bldg. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 114, 702 P.2d 459 (1985). The amount should reflect what is required to place the aggrieved party "in the same financial position he would have enjoyed in the absence of the breach." *Id.* Here, the Mocks expressed time was of the essence, informing Cook of their need for the construction to be completed on time due to the eminent expiration of their lease. The $750 was reasonably foreseeable and necessary to put the Mocks in the same financial position they would have been in the absence of the breach.

Cook next argues the general damages award was impermissibly punitive. In general, punitive damages are not allowed in arbitration or contract disputes.

Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17, 35 Wn. App. 280, 282, 666 P.2d 928 (1983) (arbitration); *Lind Bldg. Corp. v. Pac. Bellevue Devs*., 55 Wn. App. 70, 75, 776 P.2d 977 (1989) (contract).

Here, on the face of the award, the arbitrators state the general damages were for "many adverse consequences of the breach," consisting of, "a lengthy delay in the occupation and enjoyment of their entire dwelling, the time, effort, and anxiety involved in the bidding process and all other matters involved in the tearing down of the roof and its replacement, including financing issues and dealing with public officials involved in the construction of homes." CP at 31. Cook merely asserts the award was punitive without challenging the arbitrators' stated reasons. As noted, we do not consider evidence presented to the arbitrator. *Seattle Packaging Corp*., 94 Wn. App. at 487. On the face of the award, the $10,000 is compensatory, not punitive.

In sum, Cook has failed to meet its burden of establishing error. Given our holding, we do not discuss the Mocks' request to reconsider our commissioner's ruling denying their motion on the merits. Further, because the Mocks did not file a cross-appeal of the decision to deny attorney fees, we decline to analyze their attorney fee entitlement claim raised for the first time in their response brief. *See* RAP 5.1(d). The superior court awarded the Mocks $200 in statutory attorney fees, $110 in costs, and $25 in arbitration costs. Finally, no prejudice is shown by the Cook's typographical error in their notice of appeal designating Division Two as the place of appeal instead

of Division Three.

B. Attorney Fees on Appeal

The Mocks request attorney fees on appeal, citing RCW 18.27.040(6) (attorney fees and costs to the prevailing party in an action filed under this section) and RAP 18.1(a) (attorney fees and expenses if allowed by applicable law). As the prevailing parties, the Mocks are entitled to their fees and costs.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Sweeney, C.J.

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Kato, J.